STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 12, 2012

In the Matter of L. SWISS, Minor.

No. 305197
Jackson Circuit Court
Family Division
LC No. 10-001639-NA

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Respondent-appellant father appeals as of right the order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(ii), (g), (j), and (l). We affirm.

Respondent's parental rights to two of his other children were terminated in 2006. The minor child at issue here was born on June 2, 2010, suffering from a variety of physical ailments. The child's mother had mental health issues, was legally incapacitated, and resided in a group home; she was not able to care for the child. Respondent indicated that his home was not currently suitable for the child as it had recently been vandalized, and he claimed that he did not have any local family members who could care for the child. On June 11, 2010, following a preliminary hearing, the trial court authorized the petition, and it ordered that reasonable efforts be made to preserve and unify the family. On June 23, 2010, another order was entered requiring reasonable efforts at reunification. On July 1, 2010, respondent was arrested and jailed on a drug crime. On July 22, 2010, respondent entered into a parent-agency plan and service agreement with the Department of Human Services (DHS), pursuant to which he agreed to obtain parenting skills, attend parenting classes, and acquire suitable housing and employment. The plan indicated that respondent had been referred to Michigan Works for employment opportunities and that more services would be made available after respondent was released from jail.

In August 2010, an order of adjudication was entered predicated on a plea by respondent and the child's mother. Reunification efforts were still to be pursued. At a September 2010 hearing, it was noted that respondent was unsuccessfully attempting to avail himself of services through the county jail, where he was still awaiting his criminal trial. No real progress toward reunification had been made due to respondent's incarceration and the lack of available services. However, reunification remained the goal, with respondent being directed to take advantage of any services that became available in the county jail. Supervised parenting time was planned upon his release. At some point, respondent was convicted of manufacturing and delivering cocaine and assault of a jail employee, and he was sentenced in January 2011 to 23 months to 20

years' imprisonment. His earliest release date is May 30, 2012, and his maximum discharge date is June 30, 2030. In February 2011, respondent was still ordered to participate in the treatment plan by obtaining whatever services were available in prison. While imprisoned, defendant participated in Alcoholics Anonymous (AA), obtained his GED, and was placed on a waiting list for substance abuse, violence prevention, and assaultive offenders programs. In April 2011, the DHS indicated that a decision had been made to seek termination of parental rights; however, the court continued to order respondent to take advantage of whatever prison services were available. In May 2011, the DHS filed a supplemental petition for termination, and a trial was conducted in June of 2011. Respondent himself testified that his current prison stint was his fourth time in prison, having served separate prison terms in 2003, 2006, and 2008. Respondent was sent to prison in 2003 for selling narcotics and repeatedly returned to prison for threatening and intimidating behavior directed at domestic partners. The trial court terminated respondent's parental rights as indicated above, taking into account his extensive criminal history, his issues with narcotics as reflected in the previous convictions, his ongoing parental history, the lack of success in obtaining treatment while imprisoned, and respondent's general inability, under the circumstances, to provide proper care and custody. Respondent appeals as of right.[1]

"The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of" the statutory grounds for termination. MCL 712A.19b(3). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). We hold that the trial court did not clearly err in finding clear and convincing evidence establishing MCL 712A.19b(3)(g) (failure to provide proper care and custody with no reasonable expectation of an ability to do so within a reasonable time) and (j) (reasonable likelihood based on parent's conduct and capacity that child will be harmed if returned to the parent). MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). This makes it unnecessary to examine MCL 712A.19b(3)(c)(ii) and (l), including respondent's argument that §§19b(3)(l) is unconstitutional, as only one statutory ground need be established for termination. MCL 712A.19b(3); *Trejo Minors*, 462 Mich at 350. We find no clear error given respondent's negative history with respect to parental rights, his predilection to engage in criminal behavior resulting in multiple terms of imprisonment and reflecting an inability to conform his conduct to the requirements of the law, the nature of respondent's criminal acts, i.e., actions pertaining to narcotics trafficking and intimidating/assaultive behavior, his current state of incarceration and

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[1] We note that DHS and the lawyer-guardian ad litem for the child argue that we do not have jurisdiction to hear this appeal by right, pursuant to MCR 3.977(J)(1)(c), because the request for appellate counsel was not made within 14 days of the order terminating parental rights. The lower court file contains a completed request for appellate counsel that was received by the trial court on the same date as the order terminating parental rights was entered. Further, the claim of appeal and order appointing appellate counsel reflect that respondent filed a request for the appointment of appellate counsel on that same date. Accordingly, this argument has no merit.

the length of sentence absent identification of a family member or relative who could act as the child's temporary caregiver, and given the fact that respondent chose to continue his criminal ways and risk imprisonment instead of taking advantage of the opportunity to fully participate in services after DHS first became involved.

"The mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Mason*, 486 Mich at 160. "Incarceration *alone* is not a sufficient reason for termination of parental rights," and a court should take into consideration possible placement with relatives during the incarceration and evaluate whether future placement with a respondent would be appropriate. *Id.* at 146 (emphasis added). Here, incarceration was but one factor in the termination ruling. The prior parental termination proceedings, respondent's criminal history, the nature of his past criminal conduct, the potential length of respondent's sentence, the lack of suitable housing at the commencement of proceedings, the unsuitability of the child's mother, and the lack of an available relative to step in as conceded by respondent, all played a role in the termination of respondent's parental rights, not incarceration alone. Furthermore, in *Mason*, the respondent was already in prison when the DHS initiated proceedings, the respondent was effectively ignored by DHS and the trial court throughout the proceedings, no treatment or service plan for the respondent was implemented, and the court failed to consider an alternative placement with relatives. In the case at bar, respondent had not yet committed the drug crime and been arrested and jailed when protective proceedings commenced, he declined taking the child because his home was unsuitable, respondent himself stated that no relative was available for temporary placement, and the court and DHS were prepared to engage in providing services as part of a reunification effort, but respondent instead chose to violate the law, resulting in imprisonment. Indeed, as reflected above, the trial court did everything in its power to keep reunification efforts and treatment services alive despite respondent's jailing. Contrary to respondent's arguments, *Mason* is distinguishable and does not require reversal.

With respect to respondent's contention that he was denied a full and fair opportunity to complete services under the parent-agency plan and treatment agreement, the DHS did prepare a case service plan under MCL 712A.18f(3) and stuck with it for an extended period of time, but it was ultimately defendant's own behavior and decision to engage in criminal activities *after proceedings commenced* that precluded the completion of services. In *Mason*, 486 Mich at 152, our Supreme Court stated that "[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." Here, the DHS did everything it could do to engage respondent under the circumstances, and, again, there were a variety of factors, other than incarceration itself, that played a role in termination. Furthermore, the *Mason* Court ruled that reasonable efforts to reunify a parent and child are required in all cases unless otherwise indicated in MCL 712A.19a(2). *Id.* Under MCL 712A.19a(2)(a), reunification efforts need not be undertaken if MCL 722.638(1) or (2) are implicated, and MCL 722.638(1)(b)(*i*) concerns a scenario in which the DHS has determined that there is a risk of harm to a child and the respondent's parental rights to another child were previously terminated. In the present case, the DHS concluded that there was a risk of harm to the child if left in the care and custody of the parents, and the record establishes that respondent's rights to two other children were terminated. Therefore, the DHS was not even under a statutory obligation to pursue reunification. Reversal is unwarranted.

Respondent finally argues that the trial court did not make the requisite best-interests finding where it simply took note of the foster care worker's opinion. "Brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1). "Findings of fact are sufficient where it is manifest that the factfinder was aware of the factual issue, that he resolved it, and that it would not facilitate appellate review to require further explanation of the path followed by the factfinder in reaching the result." *De Voe v C A Hull, Inc*, 169 Mich App 569, 576; 426 NW2d 709 (1988). Here, the trial court clearly adopted the foster care worker's findings on the child's best interests in rendering its opinion, and it is also evident that the court was aware of the factual issue concerning the child's best interests and resolved it. The trial court did not clearly err when it found that termination of respondent's parental rights was in the child's best interests. *Trejo Minors*, 462 Mich at 356-357.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter